

ASSEMBLY BILL

No. 929

Introduced by Assembly Member Chau

February 26, 2015

An act to add Sections 638.50, 638.51, 638.52, and 638.53 to the Penal Code, relating to privacy.

LEGISLATIVE COUNSEL'S DIGEST

AB 929, as introduced, Chau. Pen registers: authorized use.

Existing law authorizes the Attorney General or a district attorney to make a written application to a judge of a superior court for an order permitting the interception of wire communication and electronic communication, as defined. Existing law permits an application to be made informally and granted orally if an emergency situation exists, and other factors are present. Existing law conditions the granting of an oral approval on the filing of a written application by midnight of the second full court day after the oral approval is made. Existing law prohibits a communication interception from lasting for longer than 30 days. Existing law permits an extension of the original order, not to exceed 30 days, upon a showing that there is continued probable cause that the information sought is likely to be obtained under the extension.

This bill would prohibit a person, other than a provider of electronic or wire communication service for specified purposes, from installing or using a pen register or a trap and trace device, as defined. The bill would authorize a peace officer to make a written application to a magistrate for an order permitting the installation and use of a pen register or a trap and trace device. The bill would permit an application to be made informally and granted orally if an emergency situation exists, and other factors are present. The bill would condition the grant

of an oral approval on the filing of a written application by midnight of the second full court day after the pen register or trap and trace device is installed. The bill would prohibit the installation and use of a pen register or trap and trace device for longer than 60 days. The bill would permit an extension of the original order, not to exceed 60 days, upon a showing that there is continued probable cause that the information sought is likely to be obtained under the extension.

The bill would make the prohibited installation or use of a pen register or a trap and trace device punishable by a fine not exceeding \$2,500, or by imprisonment in the county jail not exceeding 1 year, or by imprisonment in state prison for offenders with specified prior convictions, or by both that fine and imprisonment. By creating a new crime, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Section 638.50 is added to the Penal Code, to
2 read:
3 638.50. For purposes of this chapter, the following terms have
4 the following meanings:
5 (a) “Wire communication” and “electronic communication”
6 have the meaning set forth in subdivision (a) of Section 629.51.
7 (b) “Pen register” means a device or process that records or
8 decodes dialing, routing, addressing, or signaling information
9 transmitted by an instrument or facility from which a wire or
10 electronic communication is transmitted, but not the contents of a
11 communication. “Pen register” does not include a device or process
12 used by a provider or customer of a wire or electronic
13 communication service for billing, or recording as an incident to
14 billing, for communications services provided by such provider,
15 or a device or process used by a provider or customer of a wire
16 communication service for cost accounting or other similar
17 purposes in the ordinary course of its business.

1 (c) “Trap and trace device” means a device or process that
2 captures the incoming electronic or other impulses that identify
3 the originating number or other dialing, routing, addressing, or
4 signaling information reasonably likely to identify the source of
5 a wire or electronic communication, but not the contents of a
6 communication.

7 SEC. 2. Section 638.51 is added to the Penal Code, to read:

8 638.51. (a) Except as provided in subdivision (b), a person
9 may not install or use a pen register or a trap and trace device
10 without first obtaining a court order.

11 (b) A provider of electronic or wire communication service may
12 use a pen register or a trap and trace device for any of the following
13 purposes:

14 (1) To operate, maintain, and test a wire or electronic
15 communication service.

16 (2) To protect the rights or property of the provider.

17 (3) To protect users of the service from abuse of service or
18 unlawful use of service.

19 (4) To record the fact that a wire or electronic communication
20 was initiated or completed to protect the provider, another provider
21 furnishing service toward the completion of the wire
22 communication, or a user of that service, from fraudulent, unlawful,
23 or abusive use of service.

24 (5) If the consent of the user of that service has been obtained.

25 (c) A violation of this section is punishable by a fine not
26 exceeding two thousand five hundred dollars (\$2,500), or by
27 imprisonment in the county jail not exceeding one year, or by
28 imprisonment pursuant to subdivision (h) of Section 1170, or by
29 both that fine and imprisonment.

30 (d) A good faith reliance on an order issued pursuant to Section
31 638.52, or an authorization made pursuant to Section 638.53, is a
32 complete defense to a civil or criminal action brought under this
33 section or under this chapter.

34 SEC. 3. Section 638.52 is added to the Penal Code, to read:

35 638.52. (a) A peace officer may make an application to a
36 magistrate for an order or an extension of an order authorizing or
37 approving the installation and use of a pen register or a trap and
38 trace device. The application shall be in writing under oath or
39 equivalent affirmation, and shall include the identity of the peace
40 officer making the application and the identity of the law

1 enforcement agency conducting the investigation. The applicant
2 shall certify that the information likely to be obtained is relevant
3 to an ongoing criminal investigation and shall include a statement
4 of the offense to which the information likely to be obtained by
5 the pen register or trap and trace device relates.

6 (b) If the magistrate finds that the information likely to be
7 obtained by the installation and use of a pen register or a trap and
8 trace device is relevant to an ongoing criminal investigation, and
9 finds that there is probable cause to believe that the pen register
10 or trap and trace device will lead to obtaining evidence of a crime,
11 contraband, fruits of crime, things criminally possessed, weapons,
12 or other things by means of which a crime has been committed or
13 reasonably appears about to be committed, or will lead to learning
14 the location of a person who is unlawfully restrained or reasonably
15 believed to be a witness in a criminal investigation or for whose
16 arrest there is probable cause, the magistrate shall enter an ex parte
17 order authorizing the installation and use of a pen register or a trap
18 and trace device.

19 (c) An order issued pursuant to subdivision (b) shall specify all
20 of the following:

21 (1) The identity, if known, of the person to whom is leased or
22 in whose name is listed the telephone line to which the pen register
23 or trap and trace device is to be attached.

24 (2) The identity, if known, of the person who is the subject of
25 the criminal investigation.

26 (3) The number and, if known, physical location of the telephone
27 line to which the pen register or trap and trace device is to be
28 attached and, in the case of a trap and trace device, the geographic
29 limits of the trap and trace order.

30 (4) A statement of the offense to which the information likely
31 to be obtained by the pen register or trap and trace device relates.

32 (5) The order shall direct, if the applicant has requested, the
33 furnishing of information, facilities, and technical assistance
34 necessary to accomplish the installation of the pen register or trap
35 and trace device.

36 (d) An order issued under this section shall authorize the
37 installation and use of a pen register or a trap and trace device for
38 a period not to exceed 60 days.

39 (e) Extensions of the original order may be granted upon a new
40 application for an order under subdivisions (a) and (b) if the officer

1 shows that there is a continued probable cause that the information
2 or items sought under this subdivision are likely to be obtained
3 under the extension. The period of an extension shall not exceed
4 60 days.

5 (f) An order or extension order authorizing or approving the
6 installation and use of a pen register or a trap and trace device shall
7 direct that the order be sealed until otherwise ordered by the
8 magistrate who issued the order, or a judge of the superior court,
9 and that the person owning or leasing the line to which the pen
10 register or trap and trace device is attached, or who has been
11 ordered by the court to provide assistance to the applicant, not
12 disclose the existence of the pen register or trap and trace device
13 or the existence of the investigation to the listed subscriber or to
14 any other person, unless or until otherwise ordered by the
15 magistrate or a judge of the superior court.

16 (g) Upon the presentation of an order, entered under subdivisions
17 (b) or (e), by a peace officer authorized to install and use a pen
18 register, a provider of wire or electronic communication service,
19 landlord, custodian, or other person shall immediately provide the
20 peace officer all information, facilities, and technical assistance
21 necessary to accomplish the installation of the pen register
22 unobtrusively and with a minimum of interference with the services
23 provided to the party with respect to whom the installation and
24 use is to take place, if the assistance is directed by the order.

25 (h) Upon the request of a peace officer authorized to receive
26 the results of a trap and trace device, a provider of a wire or
27 electronic communication service, landlord, custodian, or other
28 person shall immediately install the device on the appropriate line
29 and provide the peace officer all information, facilities, and
30 technical assistance, including installation and operation of the
31 device unobtrusively and with a minimum of interference with the
32 services provided to the party with respect to whom the installation
33 and use is to take place, if the installation and assistance is directed
34 by the order.

35 (i) Unless otherwise ordered by the magistrate, the results of
36 the pen register or trap and trace device shall be provided to the
37 peace officer at reasonable intervals during regular business hours
38 for the duration of the order.

39 SEC. 4. Section 638.53 is added to the Penal Code, to read:

1 638.53. (a) Except as otherwise provided in this chapter, upon
2 an oral application by a peace officer, a magistrate may grant oral
3 approval for the installation and use of a pen register or a trap and
4 trace device, without an order, if he or she determines all of the
5 following:

6 (1) There are grounds upon which an order could be issued
7 under Section 638.52.

8 (2) There is probable cause to believe that an emergency
9 situation exists with respect to the investigation of a crime.

10 (3) There is probable cause to believe that a substantial danger
11 to life or limb exists justifying the authorization for immediate
12 installation and use of a pen register or a trap and trace device
13 before an order authorizing the installation and use can, with due
14 diligence, be submitted and acted upon.

15 (b) (1) By midnight of the second full court day after the pen
16 register or trap and trace device is installed, a written application
17 pursuant to Section 638.52 shall be submitted by the peace officer
18 who made the oral application to the magistrate who orally
19 approved the installation and use of a pen register or trap and trace
20 device. If an order is issued pursuant to Section 638.52, the order
21 shall also recite the time of the oral approval under subdivision
22 (a) and shall be retroactive to the time of the original oral approval.

23 (2) In the absence of an authorizing order pursuant to paragraph
24 (1), the use shall immediately terminate when the information
25 sought is obtained, when the application for the order is denied,
26 or by midnight of the second full court day after the pen register
27 or trap and trace device is installed, whichever is earlier.

28 (c) A provider of a wire or electronic communication service,
29 landlord, custodian, or other person who provides facilities or
30 technical assistance pursuant to this section shall be reasonably
31 compensated by the requesting peace officer's law enforcement
32 agency for the reasonable expenses incurred in providing the
33 facilities and assistance.

34 SEC. 5. No reimbursement is required by this act pursuant to
35 Section 6 of Article XIII B of the California Constitution because
36 the only costs that may be incurred by a local agency or school
37 district will be incurred because this act creates a new crime or
38 infraction, eliminates a crime or infraction, or changes the penalty
39 for a crime or infraction, within the meaning of Section 17556 of
40 the Government Code, or changes the definition of a crime within

1 the meaning of Section 6 of Article XIII B of the California
2 Constitution.

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